

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2008 Session

J. DOE v. RICHARD L. DUNCAN, ET AL.

**Appeal from the Circuit Court for Knox County
No. 3-586-05 Wheeler A. Rosenbalm, Judge**

No. E2006-02506-COA-R3-CV - FILED SEPTEMBER 18, 2008

Since plaintiff in this legal malpractice case failed to refute defendants' affidavits that they were familiar with and complied with the applicable standard of care and that plaintiff was not injured by any violation of the standard, the trial court correctly granted defendants' motion for summary judgment. The trial court did not abuse its discretion in failing to revise its order based on affidavits filed after the final order since plaintiff gave no explanation why the affidavits should be considered and since the affidavits did not create a genuine issue of material fact as to whether the defendants committed legal malpractice or injured plaintiff.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Dr. Cynthia Holmes, Sullivans Isd., South Carolina, Pro Se.

Stephen C. Daves, for the appellees, Richard L. Duncan, Meridith Bond, Sidney Gilreath and Gilreath & Associates.

OPINION

The plaintiff, Dr. Cynthia Holmes,¹ filed suit against Richard Duncan, Meridith Boyd, Sidney Gilreath and their firm, Gilreath & Associates, for legal malpractice in October of 2005. Mr. Duncan and Mr. Boyd had previously represented Dr. Holmes in an action in South Carolina against a hospital.

¹Dr. Holmes filed the suit as "J.Doe" but the trial court noted in its November 3, 2006 order that plaintiff has failed to provide an appropriate reason why she should proceed anonymously, expressly disapproved the process, and stated that the suit should have been filed as C. Holmes v. Duncan, et al. We agree and will use plaintiff's name throughout this opinion.

Dr. Holmes' complaint includes numerous causes of action, yet the essence of all Dr. Holmes' claims is that defendants committed legal malpractice since they were not prepared to proceed to trial which forced her on the eve of trial to agree to a settlement that was not appropriately advantageous to her. Dr. Holmes' alleged injury is the inadequate settlement she asserts was caused by defendants' failure to adequately prepare her case. According to Dr. Holmes, the defendants wrongfully solicited her business when they "represented themselves as 'trial attorneys' with a collective experience of more than 50 years in trying cases and on par with the 'Ness, Motley law firm.'" Defendants were also alleged to have breached the oral contract between the parties to provide Dr. Holmes legal representation at the trial of her action against the hospital. According to Dr. Holmes, the settlement and defendants' failure to try the case breached their oral agreement. Dr. Holmes alleges the defendants breached the fiduciary duty owed her and engaged in unspecified fraudulent conduct.²

The defendants filed a motion for summary judgment. Mr. Gilreath sought summary judgment on the basis that he did not represent Dr. Holmes in the South Carolina case or elsewhere. The defendants who represented Dr. Holmes in the South Carolina case, Mr. Duncan and Mr. Bond, also sought summary judgment on the basis that they complied with the applicable standard of care and that no deviation from the applicable standard injured Dr. Holmes.

In support of their motion, defendants filed the affidavits of Sidney Gilreath, Richard Duncan, and Meridith Bond. The affidavit of Mr. Gilreath stated two determinative facts, namely, that he "never represented" Dr. Holmes in any matter and that defendants Bond and Duncan had 50 years cumulative trial experience and needed no supervision from him.

According to the affidavits of Mr. Duncan and Mr. Bond, in November of 2001 they met with Dr. Holmes regarding her case that was already pending against Tenet Health Systems Medical Inc. in South Carolina and later that month they filed a notice of appearance in that matter. Between November 2001 and October 2002, defendants Duncan and Bond took several depositions and conducted other discovery. After negotiations, the parties reached a settlement which provided Dr. Holmes a confidential monetary recovery, reappointment to courtesy staff at the hospital and the right to apply for a change of status. The settlement was negotiated and effectuated with Dr. Holmes' participation.

With regard to the standard of care, both the affidavits of Mr. Duncan and Mr. Bond state that they are familiar with the standard of care for cases such as Dr. Holmes' and contain the following:

It is my opinion to a reasonable degree of legal certainty that both Meridith Bond and Richard Duncan exercised the appropriate standard of care in representing Cynthia Holmes in connection with the litigation entitled *J. Doe v. Tenet Health System Medical, Inc., et al.*, CA 00-CP-10-1888, Charleston County Court of Common

²Plaintiff includes a laundry list of other claims, which like the claims discussed above, are basically encompassed in the malpractice claim, such as unfair trade practices, civil conspiracy, promissory estoppel, conversion and inadequate supervision of Mr. Duncan and Mr. Bond by Mr. Gilreath.

Pleas. The appropriate standard of care was exercised by us both in connection with preparation of the case for trial and in settlement negotiations leading to settlement of the case.

Within a reasonable degree of legal certainty, it is [our] opinion . . . that . . . [neither parties'] representation . . . caused or contributed to any harm or injury to Cynthia Holmes.

In response to defendants' motion, Dr. Holmes filed three of her affidavits. The first two affidavits, in effect, were motions to strike and dismiss the defendants' motion.³ In her third affidavit, Dr. Holmes states that she was licensed to practice law in South Carolina during the period in question and that defendants deviated from the standard of care and such deviation caused her injuries. Other than holding a license in that state, however, Dr. Holmes made no reference to familiarity with the applicable standard of care, that she has ever practiced law, or that she has any experience that would lead one to conclude that she has familiarity with the applicable standard. Dr. Holmes failed to refute any of the substantive proof presented in defendants' affidavits. The only objections raised by Dr. Holmes to defendants' affidavits were that some referenced attachments were not attached. While it was not necessary to file the referenced materials, defendants then did so.

Also accompanying defendants' motion was a Statement of Undisputed Material Facts pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure. The defendants' Statement made specific citations to the record as required by Rule 56.03. The citations were to the defendants' affidavits. Dr. Holmes filed a sworn Response Establishing Disputed Material Facts which failed to either agree that the facts were undisputed or demonstrated that the material facts were disputed as required by Rule 56.03. The Response was sworn to by Dr. Holmes and, in effect, either stated she had no personal knowledge of the facts or provided additional information that was not germane to creating issues of fact which she says defendants failed to disclose.

The trial court held a hearing on the motion on September 15, 2006 wherein the trial court questioned Dr. Holmes closely and explained the significance of her lack of proof on the issue whether Mr. Gilreath was involved at all and whether Mr. Bond and Mr. Duncan violated the applicable standard of care which in any way that caused her any injury.

The trial court granted defendants' motion for summary judgment on November 3, 2006 and incorporated into the order a transcript of its ruling from the bench.⁴ With regard to Mr. Gilreath, since his affidavit unequivocally states he had no role in Dr. Holmes' representation and that Mr. Bonds and Mr. Duncan needed no supervision, which remained unchallenged by Dr. Holmes, the

³Dr. Holmes also filed a Memorandum In Opposition To The Motion For Summary Judgment that was sworn to by her. Given that this Memorandum was not an affidavit but contained argument and legal citations, the trial court correctly treated it as pleadings. In any event, the memorandum likewise creates no genuine issue of material fact to rebut defendants' affidavits.

⁴The trial court denied Dr. Holmes' motion to strike and to dismiss defendants' motion for summary judgment.

trial court granted Mr. Gilreath summary judgment. The trial court likewise granted Mr. Bond and Mr. Duncan summary judgment based on their affidavits that they were familiar with the applicable standard of care and that they complied with the applicable standard of care in preparing her case for trial and in its settlement and that Dr. Holmes suffered no loss from any deviation of that standard. Although the trial court found that the affidavits by Mr. Bond and Mr. Duncan “may be meager in terms,” the trial court found that they were sufficient to negate essential elements of plaintiff’s claims such that it was incumbent upon Dr. Holmes to come forward with competent evidence showing a violation of the standard of care and a resultant injury. Since Dr. Holmes came forward with no such proof, the defendants’ motion was granted. As to her other claims, the trial court found they were subsumed by the legal malpractice claim and, consequently, Dr. Holmes’ lawsuit was dismissed in its entirety against all defendants.

Thereafter on November 14, 2006, Dr. Holmes filed what was styled a “Rule 52 Motion” asking the court to revise its final order of November 3, 2006. In support of her motion, Dr. Holmes subsequently filed three additional affidavits in an effort to alter or amend the order granting summary judgment. The trial court denied Dr. Holmes’ request to amend the order granting summary judgment based upon several grounds. First, the trial court found that Dr. Holmes’ reliance on Tenn. R. Civ. P. 52.02 was misplaced since that rule does not apply to motions for summary judgment. Second, Dr. Holmes’ “motions” did not comply with Tenn. R. Civ. P. 7. Third, the trial court found the affidavits were not timely since they were filed after the order granting summary judgment was entered. Finally, the trial court found that after reviewing the three affidavits, even if they were considered, the affidavits were insufficient to create genuine issues of material fact.

Dr. Holmes appeals the order granting summary judgment.

I. STANDARD OF REVIEW

A trial court’s decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764; *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm*

Mut. Auto. Ins. Co., 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88.

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). “[I]f there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied.” *Byrd*, 847 S.W.2d at 211.

To meet the requirements for summary judgment, a defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the non-moving party’s claim or conclusively establish an affirmative defense. *Blair*, 130 S.W.3d at 767; *Staples*, 15 S.W.3d at 88. If the moving party fails to meet this burden, the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party, and the motion must be denied. *Staples*, 15 S.W.3d at 88-89.

If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d at 89. In that situation, the non-moving party has the burden of pointing out, rehabilitating, or providing new evidence to create a factual dispute as to the material element in dispute. *Staples*, 15 S.W.3d at 89; *Rains v. Bend of the River*, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003).

II. CLAIM AGAINST MR. GILREATH

Mr. Gilreath submitted proof by affidavit that at no time did he represent Dr. Holmes and that given the years of trial experience by Mr. Duncan and Mr. Bond, there was no requirement or duty that he supervise them. Dr. Holmes at no time offered any proof to refute this either before or after the trial court granted summary judgment. Consequently, summary judgment as to Mr. Gilreath is affirmed.

III. CLAIMS AGAINST MR. DUNCAN AND MR. BOND

The affidavits of Mr. Duncan and Mr. Bond provide proof that they were familiar with and met the applicable standard of care in preparing Dr. Holmes’ case for trial and during settlement negotiations. Dr. Holmes submitted no proof whatsoever to refute defendants’ familiarity with the applicable standard. Dr. Holmes’ third affidavit did state that defendants violated the standard of care; however, the affidavit failed to state that she had any familiarity with the applicable standard.

Consequently, the trial court did not err in granting summary judgment to the defendants. While plaintiff alleged numerous causes of action, we agree with the trial court that plaintiff's claim is essentially one for legal malpractice, so judgment as to all claims was appropriate.

After the trial court granted summary judgment, Dr. Holmes then asked the court to consider her fourth affidavit and the affidavit of two other South Carolina attorneys on whether the representation by defendants Mr. Duncan and Mr. Bond violated the applicable standard of care. While Dr. Holmes' request was not made appropriately, in effect, Dr. Holmes' request was one under Rule 59.04, asking the court to alter or amend the final order based on additional evidence.

Our Supreme Court has held that when additional evidence is submitted in support of a motion to revise a grant of summary judgment, the court should consider the following factors:

- 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment;
- 2) the importance of the newly submitted evidence to the movant's case;
- 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;
- 4) the likelihood that the nonmoving party will suffer unfair prejudice; and
- 5) any other relevant factor.

Stovall v. Clarke, 113 S.W.3d 715, 721 (Tenn. 2003) (standard applied to Rule 59 motion); *Harris v. Chern*, 33 S.W.3d 741, 745 (Tenn. 2000) (standard applied to Rule 54.02 motion); *Pullum v. Robinette*, 174 S.W.3d 124, 141 (Tenn. Ct. App. 2004). The trial court's ruling on a motion to alter or amend will be reversed only for an abuse of discretion. *Stovall*, 113 S.W.3d at 721.

While the trial court failed to cite *Stovall* or *Harris* or make express reference to the standard enunciated therein, we find no reversible error since the trial court is correct that even if one considers the three affidavits, there is no competent proof introduced to refute either the affidavits of Mr. Duncan and Mr. Bond that they complied with the applicable standard of care or Mr. Gilreath's affidavit that he was not involved.

The untimely affidavits provided by Dr. Holmes were from two South Carolina attorneys and Dr. Holmes herself. The affidavit of Desa Ballard, a South Carolina attorney, does not provide an opinion regarding whether defendants violated the standard of care but only points out what she believes are factual disputes between the parties. Ms. Ballard's affidavit expressly states that she does not have sufficient evidence to opine whether the standard of care was breached and whether Dr. Holmes was injured thereby. The affidavit of another attorney, Kevin Holmes, Dr. Holmes' former husband, likewise expresses no opinion on whether the standard of care was violated but instead relates a sequence of events leading up to the trial. Finally, the plaintiff filed a fourth affidavit stating that, in addition to being a physician, she is also an attorney licensed to practice in South Carolina. However, nowhere in Dr. Holmes' affidavit does she state that she ever practiced law or was familiar with the standard of care required of attorneys in her case, in South Carolina, or in any jurisdiction.

Even though the affidavits were offered by Dr. Holmes after the final order and without explanation why the trial court should consider them, nevertheless, the trial court did so. Clearly, the trial court gave this *pro se* litigant, who is also an attorney, every opportunity to present genuine issues of material fact about the defendants' alleged legal malpractice which she was unable to do.

Dr. Holmes raises several issues on appeal that she did not appear to bring to the attention of the trial court either before or after the trial court granted defendants' motion. These issues include inadequate opportunity to conduct discovery, applicability of South Carolina law, and the assertion that summary judgment was not providently granted because she did not timely receive defendants' reply to her response to their motion.⁵ Additionally, for the first time on appeal, Dr. Holmes appears to challenge the affidavits of Mr. Bond and Mr. Duncan on the ground that they are not licensed to practice law in South Carolina.⁶ The Supreme Court in South Carolina has decided this issue and held licensure is not required to give an expert legal opinion since "professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert." *Smith, Haynsworth, McKay & Geurard*, 472 S.W.2d 612, 614 (S.C. 1996). On appeal, Dr. Holmes also faintly appears to take issue with the fact that defendants' affidavits do not expressly state that they are familiar with the standard of care in South Carolina.

Failure to raise an issue in the trial court precludes our consideration of it on appeal. Our courts have consistently taken the view that "issues not raised in the trial court cannot be raised for the first time on appeal." *Correll v. E.I. DuPont de Nemours & Co.*, 207 S.W.3d 751, 757 (Tenn. 2006) (citing *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991)); *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006); *Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn. 2000); *Bell v. Todd*, 206 S.W.3d 86, 93 (Tenn. Ct. App. 2005). Consequently, the trial court's decision may not be reversed since these alleged errors were not raised to the trial court.

We will, however, discuss briefly the issue Dr. Holmes appears to raise about the defendants' familiarity with the applicable standard. It is generally recognized that "in most, if not all " jurisdictions in the United States an attorney "may be liable to his client for damages resulting from his failure to exercise [the] ordinary care, skill and diligence . . . which is commonly possessed and exercised by attorneys in practice in the jurisdiction." *Chapman v. Bearfield*, 207 S.W.3d 736, 739 (Tenn. 2006) (quoting *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984)) (in which Tennessee joined South Carolina in recognizing a statewide standard of professional care); *Smith*, 472 S.W.2d at 614. Consequently, in order to give an opinion on the standard of care, one must exhibit a familiarity with it. See *Chapman*, 207 S.W.3d at 739-40; *Smith*, 472 S.E.2d at 613-15.

⁵Even if raised before the trial court, we do not find that these alleged errors affected the summary judgment.

⁶There is no dispute that whether the defendants violated the standard of care in representing Dr. Holmes in the South Carolina lawsuit is governed by South Carolina law.

The affidavits at issue do not expressly state that affiants Bond and Duncan are familiar with South Carolina law. Regarding familiarity with the applicable standard of care, the affidavits state that Mr. Bond and Mr. Duncan both have years of complex trial experience and are “familiar with the standard of care for attorneys in cases such as *J. Doe v. Tenet Health Systems Medical, Inc., et al.*, CA 00-CP-10-1888, Charleston County Court of Common Pleas.”⁷ The trial court, without objection from plaintiff, found this to be sufficient. The reference to the court where the case was filed is sufficient to assert familiarity with the type of case and with the jurisdiction. Consequently, they were competent to present evidence to negate an essential element of the plaintiff’s claim.

Questions about the qualifications, admissibility, relevance, and competency of expert testimony are generally left to the sound discretion of the trial court. *McDaniel v. CSX Transportation*, 955 S.W.2d 257, 263 (Tenn. 1997); *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993).

As this court found in *Pullum v. Robinette*, 174 S.W.3d at 134:

The trial court has broad discretion regarding the admission of expert testimony. *Robinson*, 83 S.W.3d at 725; *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002); *McDaniel*, 955 S.W.2d at 263. Consequently, a trial court’s ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or is abused. *Stevens*, 78 S.W.3d at 832; *Seffernick v. St. Thomas Hospital*, 969 S.W.2d 391, 393 (Tenn. 1998); *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997). A finding of abuse of discretion is proper when the trial court applied an incorrect legal standard or reached a decision against logic or reasoning that caused an injustice to the party complaining. *Stevens*, 78 S.W.3d at 832; *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Shuck*, 953 S.W.2d at 669.

Accordingly, appellate courts will set aside a discretionary decision only where the trial court has misidentified, misconstrued, or misapplied the controlling legal principles, or the decision is contrary to the substantial weight of the evidence. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court, and an appellate court should allow the trial court’s exercise of discretion to stand if reasonable judicial minds could differ as to its soundness. *Eldridge*, 42 S.W.3d at 85; *White*, 21 S.W.3d at 223.

Given the applicable abuse of discretion standard, together with the plaintiffs’ failure at the trial court level to take issue with defendants’ familiarity about the standard or any perceived deficiencies with their affidavits, we will not reverse the trial court.

⁷While not necessarily dispositive, it should also be noted that in this case defendants Mr. Bond and Mr. Duncan have actually practiced law in South Carolina in association with local counsel.

For the reasons stated herein, the grant of summary judgment is affirmed. The costs of this appeal are assessed to Dr. Cynthia Holmes for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.